AND BRIEFS JUL 18 2017

NO. 16-1540 (16A1191)

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE LAW PROFESSORS SUPPORTING RESPONDENTS' OPPOSITION TO THE GOVERNMENT'S MOTION FOR CLARIFICATION AND APPLICATION FOR STAY OF MODIFIED INJUNCTION

JULY 18, 2017

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

Library of Congress

MOTION FOR LEAVE TO FILE

A group of law professors, who are scholars of immigration law and family law, respectfully move this Court for leave to file the accompanying brief, as amici curiae in support of respondents' opposition to the government's motion for clarification and application for stay of the district court's modified injunction, without 10 days' advance notice to the parties of amici's intent to file as ordinarily required by Supreme Court Rule 37.2(a).

The parties have consented in writing to the filing of the enclosed amicus brief.

1. Statement of Movants' Interest

Amici are scholars with expertise in immigration, family law, and constitutional law. The government's motion for clarification and application for stay presents the question of what constitutes a "bona fide relationship with a person or entity in the United States," the standard which, under this Court's June 26 Order, defines the appropriate scope of preliminary injunctions entered against certain sections of Executive Order 13,780. This interpretive issue lies at the intersection of immigration, family law, and constitutional law, and is one about which amici are deeply concerned. The enclosed brief applies amici's expertise by situating the Court's June 26 Order in the larger context of constitutional, statutory, and judge-made law recognizing the importance and weight of family relationships excluded from the government's extremely narrow definition of "bona fide relationship" – a classificatory scheme that cannot be reconciled

even with the specific immigration statutes that purportedly serve as its source. Amici's analysis identifies the concrete harms that persons in the United States will suffer as a result of the government's scheme, an essential consideration given the June 26 Order's appropriate concern with balancing the equities to determine the appropriate scope of preliminary injunctive relief pending further proceedings.

2. Statement Regarding Brief Form and Timing

Given the expedited consideration of this matter of significant national interest, amici respectfully request leave to file the enclosed brief supporting respondents and their opposition to the government's motion for clarification and application for stay without 10 days' advance notice to the parties of intent to file. The district court entered its modified injunction on July 13, 2017. The government's motion for clarification and application for stay in this Court were filed on June 15, 2017. Later the same day, this Court ordered a response to the government's filing by noon on June 18, 2017. This accelerated timing justifies the request to file the enclosed amicus brief supporting respondents' position without 10 days' advance notice to the parties of intent to file.

CONCLUSION

The Court should grant amici curiae leave to file the enclosed brief in support of respondents' opposition to the government's motion for clarification and application for stay of the district's court modified injunction.

Respectfully submitted,

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
Hangley Aronchick Segal
Pudlin & Schiller
One Logan Square,
27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

July 18, 2017

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. THIS COURT'S JUNE 26 ORDER REFLECTS A BALANCING OF EQUITIES BASED ON CONCRETE HARMS TO PERSONS AND ENTITIES IN THE UNITED STATES 8

A. This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family should weigh heavily in the balancing of equities. 13

B. In implementing § 6, the government overlooks concrete harms to refugee agencies and family members of refugees in the United States. 16

II. THE GOVERNMENT OVERLOOKS FEDERAL STATUTORY RECOGNITION OF FAMILY RELATIONSHIPS THAT CAN BE THE BASIS OF CONCRETE HARMS FROM UNLAWFUL DENIALS OF ADMISSIONS TO THE UNITED STATES 19

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Ablang v. Reno,
52 F.3d 801 (9th Cir. 1995) 11

Adams v. Baker,
909 F.2d 643 (1st Cir. 1990) 11

American Academy of Religion v. Napolitano,
573 F.3d 115 (2d Cir. 2009) 11

Azizi v. Thornburgh,
908 F.2d 1130 (2d Cir. 1990) 11

Bustamante v. Mukasey,
531 F.3d 1059 (9th Cir. 2008) 11

Hawaii v. Trump,
859 F.3d 741 (9th Cir.), *cert. granted*,
137 S. Ct. 2080 (2017) 12

Hawaii v. Trump,
CV. No. 17-00050, 2017 WL 2989048
(D. Haw. July 6, 2017) 16

International Refugee Assistance Project v. Trump,
857 F.3d 554 (4th Cir.), *cert. granted*,
137 S. Ct. 2080 (2017) 12

Johnson v. Whitehead,
647 F.3d 120 (4th Cir. 2011) 11

Kerry v. Din,
135 S.Ct. 2128 (2015) 11

Kleindienst v. Mandel,
408 U.S. 753 (1972) ..... *passim*

Moore v. City of East Cleveland,
431 U.S. 494 (1977) ..... *passim*

Prince v. Massachusetts,
321 U.S. 159 (1944) 14

Troxel v. Granville,
530 U.S. 57 (2000) 2, 14, 15

Trump v. International Refugee Assistance Project,
137 S. Ct. 2080 (2017) ..... *passim*

Statutes

8 U.S.C. § 1183a 5, 21

42 U.S.C. § 671 19

Other Authorities

8 C.F.R. § 213a 5, 21

8 C.F.R. § 236.3 19

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ..... *passim*

Michael Barbaro, *The Daily: Defining a 'Bona Fide' Family Relationship*, N.Y. Times, June 30, 2017, https://www.nytimes.com/2017/06/30/podcasts/the-daily/the-daily-bona-fide-trump-travel-ban.html 14

Miriam Jordan, *A Refugee Family Arrives in Arkansas, Before the Door Shuts*, N.Y. Times, July 13, 2017, https://www.nytimes.com/2017/07/13/us/trump-refugee-ban.html 17

INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration law and family law who are interested in the proper interpretation and application of U.S. laws as they concern Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), and this Court's Order in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2088–89 (2017) (per curiam) (the "June 26 Order"). This brief addresses issues specifically within amici's scholarly expertise. The Appendix to this brief contains biographical information on the amici, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration law and family law, write to emphasize how the government's position exists in profound tension with constitutional tradition and statutory law protecting close familial relationships beyond the nuclear

---

[1] No counsel for any party authored any portion of this brief, nor did any person or entity other than amici curiae or their counsel make any monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief. A motion seeking leave to file this brief is being filed concurrently.

family. This brief addresses three primary points. First, while foreign nationals residing abroad have no constitutional right to enter the United States, Americans do have justiciable constitutional interests in seeking their admission. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), instructs courts to defer to the government's admissions decisions, but only when there is a "facially legitimate and bona fide" reason supporting such decisions. At the preliminary injunction stage, the June 26 Order properly sought to balance the equities by preserving the *status quo ante* for persons and entities in the United States that would suffer harm from an unlawful decision to deny admission to a noncitizen. The Order's touchstone, therefore, is whether "any American party" would suffer "concrete hardship" should travelers be unlawfully excluded. *See* 137 S. Ct. at 2088–89.

This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family illustrate how the government's narrow interpretation of "close familial relationships" causes such concrete hardship to individuals in the United States. In cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000), the Court has recognized the central importance of close relatives such as grandparents, aunts, uncles, nieces,

nephews, and cousins, especially to children who have lost parents and families who have suffered tragedy and adversity.

The government's interpretation of the June 26 Order focuses myopically on bilateral contacts between refugees and agencies, in that the government overlooks these agencies' devotion of considerable resources to resettling these refugees, even if the federal government has been involved in forming that relationship. The government's interpretation also erects an arbitrary barrier to entry for refugees with bona fide family ties in the United States. The government's narrow definition of "close familial relationship" would exclude nieces, nephews, and grandchildren who have undergone extensive vetting through the refugee program, threatening the very vulnerable children and families who—this Court has repeatedly recognized—are often most reliant on close relatives when they have suffered the loss of their parents or other grievous hardships.

Second, the government's analysis of the Immigration and Nationality Act (INA) is either flawed or irrelevant or both. The government erroneously suggests that INA provisions regarding immigrant visa ("green card") petitions establish

traditional, nuclear familial relationships as the kind of "bona fide relationships" exempt from the travel ban, while INA provisions that recognize familial relationships for other purposes include expansive, nonnuclear familial relationships beyond the scope of "bone fide relationships" and therefore subject to the travel ban. This distinction has no bearing on the relevant inquiry, which is to identify the persons and entities in the United States that would suffer a concrete harm from an unlawful denial of admission. The class of affected Americans who could experience a concrete harm because of the government's overly narrow interpretation of "bona fide relationship" goes well beyond those who might petition for a relative through our admissions system. The travel ban sweeps in all visitors, including, for example, those entering on tourist visas to celebrate a wedding, mourn a death, receive care from a family member, or help care for a new baby or infirm relative.

Finally, even if the government were correct to use the immigrant visa provisions as a touchstone, its "nuclear family only" position is untenable. The INA clearly recognizes the interests of nonnuclear family members—such as grandparents and in-law relatives—who participate in the admission of noncitizens. Every sponsor who petitions for a noncitizen family member must assume financial

responsibility over the immigrant in the form of an affidavit of support. *See* 8 C.F.R. § 213a. If a sponsor dies after a family-based petition has been approved, the INA allows a broad range of relatives to become a "substitute sponsor," for the immigrant, including "a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild." *See* 8 U.S.C. § 1183a(f)(5)(B)(i)–(ii). This provision reflects Congress's understanding that Americans have an interest in the admission for permanent residence of members of their extended families.

ARGUMENT

This Court's June 26 Order upheld in substantial part the preliminary injunctions entered against Executive Order 13,780 by the United States District Court for the District of Hawaii and the United States District Court for the District of Maryland, each of which was sustained in substantial part on appeal by the United States Courts of Appeals for the Ninth Circuit and the Fourth Circuit, respectively. The government now returns to this Court to seek review of a subsequent order, issued on July 13, 2017, by the United States District Court for the District of Hawaii, clarifying the June 26 Order.

Amici write to apply their expertise in immigration law and family law to address two interlocking aspects of this Court's June 26 Order. First, we address the constitutional principles—drawn from precedents in both immigration law and family law—that recognize the interests of persons and entities inside the United States in the lawful administration of the immigration laws. Second, we address the federal statutes, especially the Immigration and Nationality Act, that recognize the relationships that noncitizens may have with persons and entities inside the United States.

We emphasize that these two aspects of this Court's Order are closely related in important ways that the government overlooks in mischaracterizing the relevant inquiry at this stage of this case. In particular, we have grave concerns that the government is attempting to separate the constitutional from the statutory, and to separate some parts of the statutes from others, in ways that distort the June 26 Order's purpose, rationale, and clear meaning. We also have grave concerns that the government is attempting to litigate the merits of this case rather than taking seriously this case's posture, which calls for balancing the equities to decide the scope of a preliminary injunction pending further proceedings. We believe that looking at this Court's June 26 Order as a whole—at both

constitutional and statutory considerations in the context of a preliminary injunction—makes it clear that the United States District Court for the District of Hawaii has applied this Court's Order faithfully.[2]

---

[2] The government repeatedly invokes the specter that the preliminary injunction—if applied to all noncitizens with a bona fide relationship with a person or entity inside the United States—would render the pertinent sections of Executive Order 13,780 "inoperative." Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction ("Motion for Clarification") at 23–25. This characterization is misleading. It first assumes without justification that this Court's June 26 Order was a near-complete affirmation of the government's position on the merits of the Executive Order. In fact, the Order upheld the preliminary injunctions as to a significant number of people and entities inside the United States—and thus as to a significant number of noncitizens. The government's characterization then assumes, also without justification, that this Court's Order must be applied in a way that preserves as much of Executive Order 13,780 as possible. Instead, the only fair and accurate way to define "bona fide relationship with a person or entity in the United States" is to identify relationships that would give rise to "concrete harms" that would prompt the *Mandel* inquiry into a "facially legitimate and bona fide reason." *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). It skews application of this Court's June 26 Order to attribute to this Court a purpose to allow as much of the Executive Order as possible to go into effect.

I. This Court's June 26 Order reflects a balancing of equities based on concrete harms to persons and entities in the United States.

We begin with the core of this Court's June 26 Order: that pending further proceedings, the preliminary injunctions issued by the two United States District Courts should continue to block sections 2(c), 6(a), and 6(b) of the Executive Order because implementing those sections would cause concrete harm to people or entities inside the United States. This core principle is evident from the Order's discussion of equities in Part II-B. In explaining its decision to preserve the status quo for noncitizens with a "bona fide relationship with a person or entity in the United States," the Order emphasized the "concrete burdens" that would be imposed on U.S. persons and entities by admission restrictions that may be unlawful. *See* 137 S. Ct. at 2087–88. Relatedly, the Order upheld the preliminary injunctions that protect "people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded." *Id.* at 2087.

This key part of the Court's analysis is based on established principles of constitutional law as

applied in immigration law cases, with particular emphasis on *Kleindienst v. Mandel*, 408 U.S. 753 (1972). In that case, the central question was whether the government's decision to deny admission to the Belgian Marxist scholar Ernst Mandel was unlawful because it violated the First Amendment right of persons in the United States to meet and speak with him. This Court held that the government need only base its denial on a "facially legitimate and bona fide reason." The Court found that the government had done so, so the Court rejected plaintiffs' constitutional challenges. *See* 408 U.S. at 769–70.

When courts are called upon to decide the merits of constitutional challenges to the government's decisions to deny admission to noncitizens, *Mandel* is typically cited for its degree of deference to the federal government. The requirement of a "facially legitimate and bona fide" reason for a denial of admission is a standard that the government will often meet, as it did in *Mandel*. But where, as here, the task at hand is to balance equities in the preliminary injunction context, the significance of *Mandel* lies in another, equally important aspect of that decision.

In *Mandel*, this Court started by observing: "It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of

entry to this country as a nonimmigrant or otherwise." 408 U.S. at 762. But this Court next recognized that the other plaintiffs—all individuals in the United States—had constitutional claims that courts must hear and adjudicate. This Court was especially concerned that denying these plaintiffs the opportunity to hear, meet, and speak with Mandel in person would infringe on their First Amendment rights. Accordingly, this Court discussed extensively whether, for First Amendment purposes, communications with Mandel via "tapes or telephone hook-ups[] readily supplant his physical presence." 408 U.S. at 765. Emphasizing "what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," *id.*, this Court recognized that the plaintiffs' constitutional rights were in jeopardy. *See id.*

On the particular facts of the *Mandel* case, the government satisfied the requirement of a "facially legitimate and bona fide reason." But it is clear that if the government acts for a reason that is not "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated. Indeed, judicial decisions calling for application of the "facially legitimate and bona fide reason" standard make up a substantial body of case law that scrutinizes government decisions to deny admission. Judicial review applying this standard is

not a mere rubber stamp. *See Kerry v. Din*, 135 S.Ct. 2128, 2140–41 (2015) (Kennedy, J., concurring) (analyzing "whether the reasons given by the Government satisfy *Mandel*'s 'facially legitimate and bona fide' standard"); *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125–26 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990). After *Mandel*, a court may find that a denial of admission is invalid because it is not based on a "facially legitimate and bona fide reason." Judicial review is also serious if the requirement of a "facially legitimate and bona fide reason" is taken, as some courts have, to call for rational basis scrutiny. *See, e.g.*, *Johnson v. Whitehead*, 647 F.3d 120, 127 (4th Cir. 2011); *Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

As the present case moves from its current preliminary injunction phase to a resolution on the merits, the decisions of the Ninth and Fourth Circuits suggest a very real possibility that the government's reasons for adopting and implementing sections 2(b), 6(a), and 6(b) of Executive Order 13,780 will fail the "facially legitimate and bona fide reason" test in *Mandel*. The Ninth Circuit found a likelihood that respondents would succeed with their argument that the government has failed to comply with

multiple statutory requirements. *See Hawaii v. Trump*, 859 F.3d 741, 769-82 (9th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017). Courts have identified failure to comply with the governing statute as a basis for finding that a reason for government action is not "facially legitimate." The Fourth Circuit found a likelihood that respondents would succeed with their argument that the pertinent parts of Executive Order 13,780 violate the First Amendment to the U.S. Constitution, in particular because the proffered national security rationale was a pretext and therefore not "bona fide." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 588-601 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (2017).

This Court's June 26 Order, issued in the preliminary injunction context, reflects a serious effort to balance the equities by preserving the *status quo ante* for persons and entities in the United States that would suffer harm from an unlawful decision to deny admission to a noncitizen. The Order's touchstone—whether "any American party" would suffer "concrete hardship"—unifies all of its examples: the mother-in-law, the university that has accepted a student, the employer who has hired an employee, and the audience that has invited a noncitizen speaker to address it. *See* 137 S. Ct. at 2089. This emphasis on concrete harms and burdens is the only logical way—consistent with the Order's

emphasis on balancing equities and its reliance on *Mandel* as starting points for analysis—to understand what it means for noncitizens to have a "bona fide relationship to a person or entity in the United States" or to be "similarly situated" to the examples in this Court's Order.

A. This Court's precedents affirming the constitutional significance of familial relationships beyond the nuclear family should weigh heavily in the balancing of equities.

In balancing the equities based on concrete harms within the constitutional framework for immigration law in *Mandel*, this Court's precedents affirming the existence of a constitutional interest in familial relationships that extends beyond the nuclear family are highly relevant. The government's narrow interpretation of "close familial relationships" defies the well-established constitutional tradition valuing ties beyond the nuclear family. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court embraced an expansive definition of constitutionally protected family relationships worthy of due process protection. As Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The

tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (reaffirming the importance of extended family ties, particularly for children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting) (observing that "[f]or many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood."); *Prince v. Massachusetts*, 321 U.S. 159 (1944) (analyzing the constitutional parental rights of an aunt who was guardian for her nine-year-old niece).

As a result of the government's narrow interpretation of "close familial relationships," citizens and legal residents of the United States may not enjoy the company of their closest relatives at such momentous occasions as their weddings, graduations, the funerals of loved ones, and the births of children. *See, e.g.*, Michael Barbaro, *The Daily: Defining a 'Bona Fide' Family Relationship*, N.Y. Times, June 30, 2017, https://www.nytimes.com/2017/06/30/podcasts/the-daily/the-daily-bona-fide-trump-travel-ban.html (interviewing American woman whose closest relatives, Iranian aunts and uncles, would be unable to travel to the U.S. to attend her wedding should a

travel ban remain in place). The unique and profound impact of close family members' love, consolation, support, and provision of care cannot be achieved without their physical presence in their American relatives' homes and communities. Moreover, although the "technological developments" of today might present greater opportunities for global engagement than in the days *Mandel* was decided—video streaming rather than "telephone hook-ups"—technology still cannot recreate the "particular qualities inherent" in being in the physical presence of family during life's crucial occasions. *See Mandel*, 408 U.S. at 765.

Even in families that have not suffered tragic loss, this Court has noted, close relatives play crucial roles worthy of constitutional protection. *See Moore*, 431 U.S. at 505-06 ("Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship [a grandmother and two cousins] ... cannot be lightly denied by the state"); *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) (observing that many children grow up in households without one or both parents, "whether their childhood has been marked by tragedy or filled with considerable happiness and fulfillment"). Intimate bonds with close relatives beyond the nuclear family are particularly indispensable for families touched by violence, severe hardship, or other humanitarian need, as this Court has recognized and as we discuss in greater detail below.

B. In implementing § 6, the government overlooks concrete harms to refugee agencies and family members of refugees in the United States.

In its Motion for Clarification, the government relies almost entirely on its assertion that refugee resettlement agencies do not have bilateral contacts with individual refugees. The government emphasizes that the federal government acts as an intermediary between the refugee and the refugee agency. *See* Motion for Clarification at 23–25. This point is misleading. Since it is much more faithful to the rationale of this Court's June 26 Order to balance equities in light of concrete harms suffered by persons or entities in the United States, it is clear that the United States District Court for the District of Hawaii was correct in considering *all* bona fide relationships that are "formal, documented, and formed in the ordinary course." *See Hawaii v. Trump*, CV. No. 17-00050, 2017 WL 2989048, at *2 (D. Haw. July 6, 2017) (quoting 137 S. Ct. at 2088). This must include the relationships between refugees and the agencies that have devoted considerable resources to the refugees' resettlement. The involvement of the federal government in forming that relationship does not negate its bona fide existence in the ordinary course.

Moreover, the government's interpretation of this Court's June 26 Order interposed an additional arbitrary and improper barrier to entry for refugees with family ties in the United States. With its inappropriately restrictive definition of "close familial relationship," the government refuses to admit individuals who have bona fide relationships with close family members in the United States. If allowed to stand, this would prevent nieces, nephews, and grandchildren who have been extensively vetted through the refugee program from reunifying with family members in the United States. *See, e.g.*, Miriam Jordan, *A Refugee Family Arrives in Arkansas, Before the Door Shuts*, N.Y. Times, July 13, 2017, https://www.nytimes.com/2017/07/13/us/trump-refugee-ban.html (describing situation of nephew barred from joining uncle and aunt who have raised him since infancy). Similar difficulties are noted in several affidavits attached to the Brief of International Refugee Assistance Project and HIAS as *Amici Curiae* in Support of Plaintiffs' Motion to Enforce or, in the Alternative, to Modify Preliminary Injunction, July 10, 2017 (IRAP Brief). *See* IRAP Brief, Exhibit B, Supplemental Declaration of Mark Hetfield, President and CEO of HIAS, Inc. at 2–3 (noting HIAS clients "whose only family members in the United States . . . are respectively: a grandmother; a grandfather; a grandson; an aunt; an

uncle; a cousin; a niece and a nephew; and a sister-in-law"); *id.*, Exhibit C, Declaration of Rebecca Heller, Director of International Refugee Assistance Project, at 7-10 (citing example of Ukrainian refugee whose closest family member in the United States is her grandmother).

Such examples strike at the heart of the Court's opinion in *Moore*, which recognized that families who have suffered loss or hardship are particularly reliant on close relatives beyond the nuclear family. "Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Moore*, 431 U.S. at 505. By defining "close familial relationships" to exclude aunts, uncles, cousins, and grandparents, the government's interpretation of the preliminary injunction threatens the very vulnerable individuals and families who face such adversity. If a child does not have parents able to care for her, a grandparent, aunt, or uncle lacking a sibling, child or parent in the United States cannot step in to fill the void. The importance of these ties is reflected in the federal statutes governing state child welfare systems, which require states to exercise due diligence to identify and provide notice of proceedings to a child's adult relatives within 30 days after the child is removed

from parental custody, *see* 42 U.S.C. § 671(a)(29), and in federal immigration regulations, which provide for release of juveniles into the care of adult relatives—including a brother, sister, aunt, uncle or grandparent—when there is no parent or legal guardian available, *see* 8 C.F.R. § 236.3.

II. The government overlooks federal statutory recognition of family relationships that can be the basis of concrete harms from unlawful denials of admission to the United States.

From this perspective, grounded in this Court's application of constitutional immigration law precedents to balance the equities, it becomes clear that the government's analysis of federal immigration statutes is either flawed or irrelevant, or both. In its July 14 Motion for Clarification, the government distinguishes between (a) provisions in the Immigration and Nationality Act that recognize some family relationships as the basis for petitions for immigrant visas, and (b) INA provisions that recognize some family relationships for other immigration law purposes. Motion for Clarification at 27–34. This distinction has no bearing on the

relevant inquiry, which is to balance the equities by asking about persons and entities in the United States that would suffer concrete harm from an unlawful denial of admission. This scope of inquiry, based on the limited but real inquiry required by *Mandel*, explains why this Court's June 26 Order expressly upholds the preliminary injunction to protect noncitizens with a close family relationship—such as a mother-in-law—even if the relationship is not a statutory basis for a direct immigrant visa petition. A mother-in-law would be concretely harmed by an unlawful denial of admission, so this Court's Order categorically includes that situation.

The class of affected Americans who could experience a concrete harm because of the government's overly narrow interpretation of "bona fide relationship" goes well beyond those who might petition for a relative through our admissions system. Americans seek the company, solace, and support of overseas grandparents, aunts and uncles, nieces and nephews, and cousins for many reasons—to mourn the unexpected death of a friend or relative, to celebrate a wedding, or to introduce a new baby born into the family. Reuniting families in these instances would require no green card or even a petition to be filed by an American. A simple tourist visa—sought by the overseas relative, not by the American resident or citizen—is all that would be required to facilitate family reunification.

Even where an immigrant is seeking permanent residence through a family relationship, the INA recognizes that family members beyond those authorized to sponsor the immigrant have an interest in his or her admission. Consider, for example, the "affidavit of support" requirement. Every sponsor who petitions for a noncitizen family member must assume financial responsibility over the immigrant in the form of an affidavit of support. *See* 8 C.F.R. § 213a. If a sponsor dies after a family-based petition has been approved, the INA allows a broad range of relatives to become a "substitute sponsor" for the immigrant, including "a spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild." *See* 8 U.S.C. § 1183a(f)(5)(B)(i)–(ii). This provision reflects Congress's understanding that Americans have an interest in the admission for permanent residence of members of their extended families.

CONCLUSION

In sum, the District Court's decision is faithful to this Court's July 26 Order, which properly required a balancing of equities to preserve the *status quo ante* for persons and entities in the United States that would suffer harm if the government's cramped definition of "bona fide relationship" prevails. The

government's position stands in opposition to statutory law and to constitutional precedents weighing heavily in that balance intimate bonds formed with close relatives beyond the nuclear family. The harms the government would inflict on American families and their relatives abroad by narrowly construing "close familial relationships" epitomize the "concrete hardships" this Court rightly sought to avoid in upholding, in substantial part, the district courts' preliminary injunctions.

Respectfully submitted,

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
Hangley Aronchick Segal
Pudlin & Schiller
One Logan Square,
27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

July 18, 2017

APPENDIX

APPENDIX
AMICI CURIAE LAW PROFESSORS*

Kerry Abrams is Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, *California Law Review*, *Michigan Law Review*, and *Virginia Law Review*, among others.

Kristin Collins is a Peter Paul Career Development Professor and the Associate Dean for Research & Intellectual Life Boston University School of Law. Professor Collins teaches courses on federal courts, civil procedure, citizenship law, family law, and legal history. She has written extensively on the legal history of the family, and in particular on the history of citizenship transmission. Her articles have appeared in the *Yale Law Journal*, *Duke Law Journal*, the *Vanderbilt Law Review*, *Law and History Review*, among others.

Ann Laquer Estin holds the Aliber Family Chair in Law at the University of Iowa. Professor Estin teaches primarily in the area of family law, with a particular focus on international and comparative

---

* Affiliation of amici curiae are listed for identification purposes only.

family law. She has written extensively in these areas, and is the author of the *International Family Law Desk Book* (2d ed. 2016). Professor Estin is a member of the bar in Colorado and Iowa, and an elected member of the American Law Institute.

Stephen Lee is Professor and Associate Dean for Research and Development at the University of California, Irvine School of Law. He writes and teaches in the areas of immigration law, administrative law, and food law. Professor Lee has received grants from the National Science Foundation and the Russell Sage Foundation and is an elected member of the American Law Institute. His work has appeared or is forthcoming in the *Harvard Law Review*, *Stanford Law Review*, *California Law Review*, and the *University of Chicago Law Review*, among others.

Hiroshi Motomura is the Susan Westerberg Prager Professor of Law at the School of Law, University of California, Los Angeles. He is the author of several pioneering law review articles on constitutional immigration law and two influential books: *Immigration Outside the Law* (2014), and *Americans in Waiting* (2006), and a co-author of two widely used law school casebooks: *Immigration and Citizenship: Process and Policy* (8th ed. 2016), and *Forced Migration: Law and Policy* (2d ed. 2013). He was selected as a Guggenheim Fellow in 2017.

Serena Mayeri is Professor of Law and History at the University of Pennsylvania Law School, where she teaches and writes about family law, antidiscrimination law, and legal history. Her articles on the constitutional treatment of nonmarital

and extended families have recently appeared or are forthcoming in the *California Law Review*, the *Yale Law Journal*, and *Constitutional Commentary*. She is also the author of a prize-winning book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011).